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Varian Medical Systems, Inc.

**BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

In the Matter of the Petition for Review by  
Hewlett-Packard Company and Varian Medical  
Systems, Inc. of the San Francisco Bay Regional  
Water Quality Control Board Letter dated January  
23, 2014 Pursuant to Water Code Section 13267

**PETITION FOR REVIEW  
AND REQUEST FOR  
HEARING**

Hewlett-Packard Company and Varian Medical Systems, Inc. ("Petitioners")  
hereby file this Petition for Review and Request for a Hearing by the State Water  
Resources Control Board ("State Board") of the letter from the San Francisco Bay  
Regional Water Quality Control Board (the "Regional Board") dated January 23, 2014  
issued pursuant to Water Code Section 13267 and pertaining to required indoor air testing

in the vicinity of 640 Page Mill Road, Palo Alto, Santa Clara County (the “Order”). This Petition for Review is filed pursuant to the Water Code § 13320 and 23 CCR §§ 2050 et seq. A copy of the Order is attached hereto as Exhibit A.

**Notwithstanding this Petition, Petitioners are moving forward with and implementing the work set forth in the *Addendum to the February 17, 2012 Revised Work Plan for Indoor Air Testing*.** Petitioners have filed this Petition as a protective filing to preserve their rights and to allow for a forum where the impacts and the basis for the new approach to vapor intrusion investigations dictated to the Regional Board by EPA Region 9 may be discussed and addressed. Petitioners are concerned with procedural and other defects relating to the Order, particularly the Regional Board’s direction that Petitioner’s approved Work Plan be revised to incorporate certain requirements of a December 3, 2013 letter from EPA Region 9 to the Regional Board purporting to communicate new requirements for vapor intrusion sampling in the South Bay (the “EPA Letter”). The required revision to the approved Work Plan and incorporation of the EPA Letter requirements is particularly troubling given that EPA Region 9 failed to follow any formal procedure in establishing the requirements and these requirements may have far reaching impacts and create significant uncertainty, not only for Petitioners, but also for the residents and business owners in Palo Alto who will be subject to the disruption inherent in their implementation.

Petitioners acknowledge the significant efforts of the Regional Board over the period of more than twenty-five years in which Petitioners and the Regional Board have worked together to investigate and address conditions in the California-Olive-Emerson (“COE”) Study Area. Petitioners acknowledge that the Regional Board received from EPA Region 9 multiple written communications directing the Regional Board on how the ongoing vapor intrusion study should be modified and how previous conclusions should be reversed. Petitioners recognize that the Regional Board seeks to work closely with and to cooperate with EPA Region 9. However, significant procedural issues and practical uncertainties are triggered when the Regional Board reverses approvals it has previously issued and does not apply its own published sampling procedures, standards, screening levels, and action levels or those published by U.S. EPA, but, rather selectively applies to nine sites in the South Bay Area new “requirements” communicated by letter from EPA Region 9 to the Regional Board.

Petitioners seek to resolve this matter through discussions with the Regional Water Board and EPA Region 9 regarding appropriate next steps in the ongoing indoor air testing. Because Petitioners are confident that this matter can be resolved in a timely manner, Petitioners request the State Board to hold this Petition in abeyance pursuant to 23 CCR § 2050.5.

I. Name and Address of Petitioners

Petitioners are:

Hewlett-Packard Company, 3000 Hanover Street, Palo Alto, California 94304  
who may be contacted through its counsel of record:

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II. The Regional Board Action for Which This Petition for Review is Sought

The Regional Board action for which this Petition for Review is filed is the  
issuance of the Order.

III. Date the Regional Board Acted

The date of the Regional Board's action Petitioners request the State Board to  
review occurred on January 23, 2014.

IV. Statement of the Reasons the Action was Inappropriate and Improper

The issuance of the Order was beyond the authority of the Regional Board and  
inappropriate and improper as explained below.

### **Background:**

Petitioners have been cooperating with the Regional Board and with EPA Region 9 since the early 1980s to investigate and implement response actions at and near the 640 Page Mill Road and 601 California Avenue sites. These sites and the area downgradient are known as the California-Olive-Emerson Study Area (the “COE Study Area”). In September 2010, the Regional Board and EPA Region 9 issued a report that concluded that further study was needed in the COE Study Area of the potential for vapors, primarily trichloroethylene (“TCE”), to migrate from affected groundwater into buildings.

In response, Petitioners submitted to the Regional Board a Work Plan for Indoor Air Testing – COE Study Area for 640 Page Mill Road and 601 California Avenue, which was approved by the Regional Board by letter dated March 12, 2012 (the “Work Plan”). The Regional Board approval letter is attached as Exhibit B. Between April 2012 and August 2012, Petitioners implemented the indoor air sampling program set forth in the Work Plan. Petitioners sampled the indoor air of 12 single-family and five multi-family buildings. The samples were collected and analyzed in accordance with EPA and Regional Board requirements and all results indicated **no detection** in the living spaces of TCE or other constituents in the groundwater underlying the properties. These results were communicated in writing by EPA Region 9 to the residents of the single-family homes by letters dated December 13, 2012. These letters stated:

Trichloroethylene (TCE) was not detected in your home. ... The indoor air sampling results from the 12 residences sampled in the area, including your home, indicate that vapor intrusion from subsurface groundwater contamination does not appear to be occurring. ***Therefore, no additional air sampling is recommended at your home.***

An example EPA Region 9 letter to residents is attached as Exhibit C (redacted to protect the name and address of the homeowner).

In September 2013, Petitioners were informed that EPA Region 9 was considering reversing some of its conclusions regarding the COE indoor air study. In response Petitioners wrote to the Regional Board and EPA Region 9 and by letter dated October 23, 2013, expressed their concern regarding the proposed reversal of conclusions previously made and communicated to residents by EPA Region 9 and the intention of the agencies to impose a new approach and new set of standards and requirements on the on-going COE vapor intrusion investigation. A copy of Petitioners’ letter to the Regional Board and EPA Region 9 is attached as Exhibit D. Petitioners requested a meeting with management of the agencies to discuss their concerns. A meeting was held on October 30, 2013 among representative of Petitioners and EPA Region 9, however, the Regional Board was unable to attend. At the meeting, EPA Region 9 expressed its views on its new approach to vapor intrusion investigations in the South Bay area. EPA Region 9 also indicated that it

expected EPA headquarters to publish, before the end of the 2013 calendar year, new TCE short-term action levels. However, as of the date of filing this Petition, EPA headquarters has not issued any TCE short-term action levels. It is unclear if the short-term action levels in the letter from EPA Region 9 will be consistent with any short-term action levels that may be published by EPA headquarters.

In an effort to address the concerns of EPA Region 9, and in response to requests from the Regional Board and EPA Region 9, in November 2013, Petitioners submitted to the Regional Board a proposed Addendum to Petitioners' previously approved Work Plan. By memorandum dated November 26, 2013, EPA Region 9 communicated to the Regional Board extensive comments on Petitioners' proposed Addendum. A copy of the EPA Region 9 November 26, 2013 memorandum is attached as Exhibit E. The EPA Region 9 comments made clear that EPA Region 9 was imposing on the Regional Board a whole new set of requirements that were not based on U.S. EPA published regulations, standards or guidance and which were not consistent with Water Board published regulations, standards and guidance.

Then, by letter dated December 3, 2013, EPA Region 9 communicated to the Regional Board "EPA Region 9 Guidelines and Supplemental Information Needed for Vapor Intrusion Evaluations at the South Bay National Priorities List (NPL) Sites" ("EPA Letter"). A copy of the EPA Letter is attached as Exhibit F. Following the Regional Board's receipt of the EPA Letter, the Regional Board informed Petitioners that it intended to impose the "guidelines" in the EPA Letter to Petitioners' ongoing study of indoor air in the COE Study Area. Stated shortly, Petitioners were informed by the Regional Board that they were required to modify their approved Work Plan to include the new "guidelines" contained in the EPA Letter.

The "guidelines" set forth in the EPA Letter have not been developed pursuant to a formal rulemaking process or even adopted as official guidance by the Region, or (more importantly) issued by or adopted by US EPA headquarters. In fact, the guidelines are potentially inconsistent with federal draft guidance in a number of ways. Specifically, the short-term response action levels that are included in the EPA Letter are not included in the draft "OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air", which was issued for comment by the U.S. EPA Office of Solid Waste and Emergency Response in April 2013, a copy of which is attached as Exhibit G. This is particularly noteworthy since the EPA Letter cites a September 2011 EPA IRIS study as the basis for the short-term response action levels, but the IRIS study was published more than a year and a half before the draft EPA Office of Solid Waste draft guidance was issued for public comment.

Petitioners value their relationship with the Regional Board and EPA Region 9 and as stated previously, Petitioners will implement the work set forth in the Addendum to the February 17, 2012 Revised Work Plan for Indoor Air Testing. However, Petitioners believe that there are significant procedural deficiencies in the Regional Board's incorporation of requirements of the EPA Letter into the Order and

imposition of EPA Region 9's "guidelines" to the COE Study Area, and are filing this Petition to allow for a forum to discuss these issues. The imposition of new "guidelines," which have not been subject to public notice or comment or any formal vetting process, and which supplant established and published sampling procedures, standards, screening levels, and action levels of the Regional Board and U.S. EPA, have resulted and are likely to continue to result in conflicting and confusing communications to Petitioners, as well as residents and property owners in the South Bay Area. The implementation of these uncertain "guidelines" may result in duplicative and unwarranted sampling that will be disruptive to families and businesses in Palo Alto. Petitioners also note that the new "guidelines" are being applied by the Regional Board selectively to only nine sites in the South Bay Area.

Therefore, the Regional Board has acted inappropriately and improperly as follows:

- A. The Regional Board incorporated certain of the EPA Letter "guidelines" into the Water Board's request for a revision of the Work Plan and into the Order. Those "guidelines" have not been subject to public notice or comment and otherwise fail to comply with the essential requirements of administrative law. Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.
- B. By incorporating certain of the EPA Letter guidelines into the Water Board's request for a revision of the approved Work Plan and into the Order, the Regional Board applied EPA Region 9's guidelines in contravention of its own published standards and criteria, e.g., the San Francisco Bay Regional Water Quality Control Board 2013 Tier ESLs. Such action is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.
- C. The Regional Board incorporated certain of the EPA Letter "guidelines" into the Water Board's request for a revision of the approved Work Plan and into Order, which are potentially inconsistent with published draft Guidance from the U.S. EPA Office of Solid Waste, and which are subject to change once the U.S. EPA Office of Solid Waste Guidance becomes final. Such action by the Regional Board is contrary to law, beyond the Water Board's authority, an abuse of discretion and without support in the administrative record.
- D. The Regional Board reversed its March 12, 2012 approval of Petitioners' Work Plan for indoor air testing in the COE Study Area without a basis in the law or support in the administrative record, which is beyond the Regional Board's authority, an abuse of discretion, and arbitrary and capricious. Specifically, more than 18 months after approving Petitioners' Work Plan for a vapor intrusion study in the COE Study Area, while the study was well underway, without any changes in the site remedial decision documents, regulations, published standards or other legal requirements, the Regional Board informed Petitioners that the

Work Plan required significant changes before Petitioners could continue to implement the study.

- E. The Regional Board specified the design, location, type of construction and/or particular manner in which compliance was to be accomplished by Petitioners in their implementation of the COE indoor air study, which is expressly prohibited by Water Code §13360. Under Water Code § 13360, a Regional Board order may not specify the design, location, type of construction, or particular manner in which compliance with an order may be accomplished; although the Regional Board may suggest methods for compliance, the recipient of the order must be allowed to comply in any lawful manner. In the instant matter, the Regional Board specified the exact properties to be sampled (location); the location for placement of the sampling devices (e.g., crawl spaces); the particular manner in which samples are to be collected (e.g., HVAC off for at least 36 hours prior to and during the sampling); and the location of the study boundaries. Petitioners must be allowed to comply in any lawful manner.
- F. The Regional Board included in the Order a requirement to sample in residential crawl spaces, which is in conflict with the published screening levels of the San Francisco Bay Regional Water Quality Control Board, which establish screening levels for: 1) groundwater; 2) soil; 3) soil gas and 4) indoor air. No screening level has been established for crawl space air and as such it is inappropriate for the Regional Board to require the collection of data for which there is no basis to determine if further action is warranted. Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.
- G. The Regional Board included in the Order a recommendation to conduct two closely spaced sampling events one or two weeks apart. The Regional Board may approve or disapprove of a work plan but it is beyond the authority of the Regional Board to include a recommendation that substantially modifies the substance of an approved work plan. Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.
- H. The Order was issued pursuant to Water Code Section 13267, which allows the Regional Board to require the submission of technical or monitoring reports. However, the Order imposes remedial obligations and remedial performance standards on Petitioners. Water Code Section 13267 does not authorize the Regional Board to impose such obligations. The remedial obligations and remedial performance standards have been imposed on Petitioners without the procedural and factual basis that would be required by California Water Code Section 13304 for the issuance of a Cleanup and Abatement Order. Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.

- I. The Regional Board failed to base the Order on material facts supported by substantial, relevant evidence in the record. For example, and without limitation, the Order fails to recognize, reconcile, or address: (1) the data collected to date indicating no detection of TCE in the indoor air of living spaces of homes overlying the highest levels of groundwater contamination; or (2) the statements of EPA Region 9 Assistant Director Site Cleanup Branch, Superfund Division, Kathleen Salyer, that sampling in buildings overlying lower levels of groundwater contamination is not warranted when sampling in homes overlying the areas of highest groundwater contamination show no vapor intrusion is occurring (See Exhibit H). Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.
- J. The Regional Board acted arbitrarily in issuing the Order in that the Regional Board has applied EPA Region 9's "guidelines" to only nine sites in the South Bay Area. Such action by the Regional Board is contrary to law, beyond the Regional Board's authority, an abuse of discretion and without support in the administrative record.

V. Petitioners are Aggrieved

Petitioners are aggrieved for the reasons set forth above.

VI. Petitioners' Requested Action by the State Board

Petitioners respectfully request that the State Board determine that the Regional Board's actions in requiring the Addendum and issuing the Order was inappropriate and improper, and that the State Board assume the power of the Regional Board to rescind or amend the Order in accordance with this Petition for Review and applicable law. Petitioners request the State Board to hold in abeyance this Petition for Review and Request for Hearing pending the Regional Board's consideration of Petitioners' request for reconsideration and further discussions between Petitioners and the Regional Board.

VII. Statement of Points and Authorities

Petitioners will provide a detailed statement of points and authorities in the event it activates this Petition for Review.

VIII. Statement of Transmittal of Petition to the Regional Board

A copy of this Petition has been transmitted to the Executive Officer of the Regional Board on February 24, 2014.

IX. Statement that the Issues Raised in the Petition Were Raised Before the Regional Board




Petitioners have raised the substantive issues and objections raised in this Petition with the Regional Board in meetings, letters, telephone calls, emails and other communications. Furthermore, by letter dated February 21, 2014, Petitioners submitted a request for reconsideration to the Executive Director of the Regional Board requesting that the Regional Board meet with Petitioners to discuss the project and to develop a path forward that addresses the concerns raised by Petitioners.

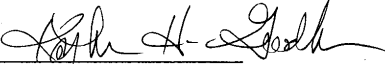
Petitioners reserve their right to request a hearing for the purpose of presenting additional evidence not previously presented to the Regional Board, in accordance with 23 CCR § 2050.6(b).

Respectfully submitted,

Date: February 24, 2014

By:   
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Date: February 24, 2014

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